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IN THE
COURT OF APPEALS OF INDIANA

DONALD E. WEAVER, JR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 27A02-0610-CR-942
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE GRANT SUPERIOR COURT
The Honorable Jeffrey D. Todd, Judge
Cause No. 27D01-0510-FA-160

August 31, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SHARPNACK, Judge

Donald E. Weaver, Jr., appeals his convictions for attempted murder as a class A felony,[1] unlawful possession of a firearm by a serious violent felon as a class B felony,[2] and being an habitual offender.[3] Weaver raises two issues, which we restate as:

I. Whether the evidence is sufficient to sustain his conviction for attempted murder; and

II. Whether he was denied the effective assistance of trial counsel.

We affirm.[4]

The relevant facts follow. On October 4, 2005, Weaver and his girlfriend, Stacey Fritch, were together in Weaver's green Ford Explorer and were running some errands and visiting friends. During the evening, Weaver told Fritch that he was upset with Jerome Robertson because Robertson had given Weaver $300 in counterfeit money when Weaver sold crack cocaine to Robertson. After Weaver and Fritch arrived at Fritch's apartment, Weaver received a call on his cell phone. Weaver said, "that was him." Transcript at 120. The pair left Fritch's apartment with Fritch driving Weaver's Explorer. They stopped at Weaver's parents' apartment, where Weaver went inside and

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[1] Ind. Code §§ 35-41-5-1 (2004); 35-42-1-1 (2004) (subsequently amended by Pub. L. No. 151-2006, § 16 (eff. July 1, 2006); Pub. L. No. 173-2006, § 51 (eff. July 1, 2006); Pub. L. No. 1-2007, § 230 (eff. Mar. 30, 2007)).

[2] Ind. Code § 35-47-4-5 (2004) (subsequently amended by Pub. L. No. 151-2006, § 21 (eff. July 1, 2006)).

[3] Ind. Code § 35-50-2-8 (Supp. 2005).

[4] We remind the court reporter that Ind. Appellate Rule 29(B) provides: "Nondocumentary and oversized exhibits shall not be sent to the Court, but shall remain in the custody of the trial court or Administrative Agency during the appeal. Such exhibits shall be briefly identified in the Transcript

came back to the Explorer with a gun wrapped in a red bandana. As Fritch was driving, they saw a man on a bicycle, and Weaver told her "that was him or there he is." Id. at 129. Fritch stopped the Explorer, and Weaver yelled for Robertson and motioned for him to come over to the vehicle. Robertson approached Weaver, and Weaver started a conversation with Robertson about the counterfeit money. Weaver then fired his gun at Robertson, hitting Robertson in the chest and arm. Robertson rode away on his bicycle, and Weaver continued to shoot at Robertson five more times. Weaver then told Fritch to drive away.

Robertson obtained assistance from a nearby convenience store and was transported to the hospital. Officers located Weaver's Explorer and attempted to stop it, but Weaver told Fritch to keep driving. When the officers ultimately stopped the vehicle, Weaver tossed the gun underneath Fritch's seat. Weaver then told Fritch that he loved her and "don't tell on me." Id. at 143.

Five shell casings were found at the scene of the shooting and were determined to have been fired from the gun found in Weaver's Explorer. Additionally, the bullet removed from Robertson was found to have been fired from the same gun.

The State charged Weaver with attempted murder as a class A felony, unlawful possession of a firearm by a serious violent felon as a class B felony, and being an habitual offender. During the jury trial, Robertson testified that he had done "some

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where they were admitted into evidence. Photographs of any exhibit may be included in the volume of documentary exhibits."

prison time" with Weaver. Id. at 269. Weaver's counsel objected and asked that the comment be stricken, and the trial court granted the request. The trial court ordered that the comment be stricken and that the jury ignore the statement and not consider it in any way. Additionally, Officer Justin Faw testified as follows:

> Q. Can you tell the jury whether the shell casings' location were consistent, uh, with Stacey Fritch's, uh, description of how the shooting occurred?
> A. Yes the shell casings, uh, lying there, uh, would affirm her statement.
> Q. Would the shell casings, 'scuse me, consistency be present in the number of shell casings you found? In terms of her description of how many shots were fired?
> A. Yes she stated five (5) ta six (6) an' I located five (5).

Id. at 223.

The jury found Weaver guilty as charged. The trial court sentenced him to fifty years for attempted murder, enhanced by thirty years due to his status as an habitual offender, and a concurrent sentence of twenty years for the unlawful possession of a firearm by a serious violent felon conviction.

I.

The first issue is whether the evidence is sufficient to sustain Weaver's conviction for attempted murder. When reviewing claims of insufficiency of the evidence, we do not reweigh the evidence or judge the credibility of witnesses. Jordan v. State, 656 N.E.2d 816, 817 (Ind. 1995), reh'g denied. Rather, we look to the evidence and the reasonable inferences therefrom that support the verdict. Id. We will affirm the

conviction if there exists evidence of probative value from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. Id.

The offense of attempted murder is governed by Ind. Code § 35-42-1-1 and Ind. Code § 35-41-5-1. To convict a defendant of attempted murder, the State must prove beyond a reasonable doubt that the defendant, acting with the specific intent to kill, engaged in conduct which constitutes a substantial step toward the commission of murder. Mitchem v. State, 685 N.E.2d 671, 676 (Ind. 1997). According to Weaver, the evidence was insufficient to demonstrate that he had the specific intent to kill Robertson. Weaver argues that he was close enough to shoot Robertson five or six times at close range if he wanted to kill Robertson and that he and the gun were moving away from Robertson at the time of the shooting.

The Indiana Supreme Court has "unequivocally determined that the requisite intent to kill may be inferred from the use of a deadly weapon in a manner likely to cause death or great bodily harm." Maxwell v. State, 731 N.E.2d 459, 462 (Ind. Ct. App. 2000) (citing in part Bartlett v. State, 711 N.E.2d 497, 500 (Ind. 1999), and Wilson v. State, 697 N.E.2d 466, 475 (Ind. 1998), reh'g denied), trans. denied. The State presented evidence that Robertson was on his bicycle near the passenger door of Weaver's vehicle and that Weaver was seated in the passenger seat. Weaver then fired his gun at Robertson, hitting Robertson in the chest and arm. Robertson rode away on his bicycle, and Weaver continued to shoot at Robertson five more times.

We agree with the State that "[t]he fortuitous fact that after Weaver shot Robertson once, Robertson was able to ride away on his bike and avoid being hit by the subsequent shots fired by Weaver does not negate Weaver's intent to kill Robertson." Appellee's Brief at 9. Firing five to six shots in Robertson's direction "undoubtedly constitutes using a deadly weapon in a manner likely to cause death." Cook v. State, 675 N.E.2d 687, 692 (Ind. 1996). We conclude that the State presented evidence of probative value from which a reasonable jury could have found that Weaver had the specific intent to kill Robertson and that Weaver was guilty beyond a reasonable doubt of attempted murder. See, e.g., id. (holding that the evidence was sufficient to sustain the defendant's conviction for murder despite the defendant's argument that he did not have the intent to kill); Maxwell, 731 N.E.2d at 462 (holding that the evidence was sufficient to sustain the defendant's conviction for attempted murder where he pointed and shot his handgun at two victims at close range).

II.

The next issue is whether Weaver was denied the effective assistance of trial counsel. To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate both that his counsel's performance was deficient and that he was prejudiced by the deficient performance. Ben-Yisrayl v. State, 729 N.E.2d 102, 106 (Ind. 2000) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984), reh'g denied), reh'g denied, cert. denied, 534 U.S. 830, 122 S. Ct. 73 (2001). A counsel's performance is deficient if it falls below an objective standard of reasonableness based on

prevailing professional norms. French v. State, 778 N.E.2d 816, 824 (Ind. 2002). To meet the appropriate test for prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. Failure to satisfy either prong will cause the claim to fail. Id.

Weaver argues that his trial counsel was ineffective for three reasons: (1) he failed to request a lesser included offense instruction of attempted reckless homicide; (2) he failed to request a mistrial when Robertson testified that he had known Weaver in prison; and (3) he failed to object to the admission of evidence, specifically an x-ray and alleged vouching testimony by an officer. We will address each contention separately.

A. Lesser Included Instruction.

Weaver argues that his trial counsel was ineffective for failing to request an instruction regarding the lesser included offense of "attempted reckless homicide." Appellant's Brief at 16. "[F]ailure to submit an instruction is not deficient performance if the court would have refused the instruction anyway." Williams v. State, 706 N.E.2d 149, 161 (Ind. 1999), reh'g denied, cert. denied, 529 U.S. 1113, 120 S. Ct. 1970 (2000). A trial court properly accepts a proposed instruction if "it is a correct statement of the law, it is supported by the evidence, it is not covered by another instruction, and it does not tend to mislead or confuse the jury." Nantz v. State, 740 N.E.2d 1276, 1283 (Ind. Ct. App. 2001), trans. denied.

Weaver is required to show that the trial court would have accepted a proposed instruction regarding "attempted reckless homicide." However, Indiana courts have recognized that the offense of attempted reckless homicide does not exist. See, e.g., Yeagley v. State, 467 N.E.2d 730, 736 (Ind. 1984) ("The courts of this state, however, have previously found that no such offense can exist since the attempt statute applies only to specific intent crimes."); Humes v. State, 426 N.E.2d 379, 382 (Ind. 1981) (noting that there are no statutory crimes of attempted involuntary manslaughter or attempted reckless homicide in this state); Funk v. State, 714 N.E.2d 746, 749-750 (Ind. Ct. App. 1999) (noting that the State conceded that no such offense of "attempted reckless homicide" existed because the attempt statute only applied to "specific intent crimes"), reh'g denied, trans. denied; Vandeventer v. State, 459 N.E.2d 1221, 1222 (Ind. Ct. App. 1984). Because there is no offense of attempted reckless homicide, the trial court would have refused the instruction. See, e.g., Yeagley, 467 N.E.2d at 736 ("Since there is no offense of attempted reckless homicide, the trial court did not err in refusing defendant's tendered instruction on the crime."). Consequently, Weaver has failed to show that his trial counsel's performance was deficient or that he received ineffective assistance of counsel on this issue. See, e.g., Smith v. State, 792 N.E.2d 940, 945-946 (Ind. Ct. App. 2003) (holding that the defendant failed to show his trial counsel was ineffective for failing to offer lesser included offense instructions to the trial court), trans. denied.

B. Mistrial Request.

Weaver argues that his trial counsel was ineffective because he failed to request a mistrial after Robertson testified as follows:

> Q Did you have anything against Donald Weaver on that night?
>
> A No never had anything, I mean, no problems wid'im [sic] we grew up tagether [sic], like I said, did some prison time tagether [sic].

Transcript at 269. Weaver's counsel objected and asked that the comment be stricken, and the trial court granted the request. The trial court ordered that the comment be stricken and that the jury ignore the statement and not consider it in any way. According to Weaver, his trial counsel should have requested a mistrial because this statement "sufficiently influenced" the jury such "that they were persuaded that [Weaver] intended to kill Robertson." Appellant's Brief at 19.

"Where the jury is admonished by the trial judge to disregard what has occurred at trial, the court's refusal to grant a mistrial is not reversible error." Duncanson v. State, 509 N.E.2d 182, 186 (Ind. 1987). Moreover, "[t]o determine whether a mistrial is warranted, we consider the probable persuasive effect of the alleged error on the jury's decision." Bouye v. State, 699 N.E.2d 620, 623 (Ind. 1998). Given the overwhelming evidence in this case that Weaver shot at Robertson multiple times at close range, Robertson's passing reference to being in prison with Weaver is unlikely to have influenced the jury's decision. See, e.g., id. at 624 (holding that a witness's passing reference that he knew the defendant from "Job Corps, Boy's School, somewhere, I don't know exactly" would "probably have had a minimal persuasive effect on the jury's decision"). Consequently, Weaver has failed to show that he was prejudiced by his trial

counsel's failure to request a mistrial based upon Robertson's testimony. See, e.g., id. (holding that the defendant failed to show that he was prejudiced by his trial counsel's failure to request a mistrial).

C. Admission of Evidence.

Weaver contends that his trial counsel was ineffective for failing to object to the admission of an x-ray and alleged vouching testimony. In order to prevail on a claim of ineffective assistance of counsel due to a failure to object, a defendant must prove that an objection would have been sustained if made and that he was prejudiced by the failure. Polk v. State, 822 N.E.2d 239, 250 (Ind. Ct. App. 2005), trans. denied.

Weaver argues that the State failed to lay a proper foundation for the admission of an x-ray of Robertson that shows a bullet in his arm. Even if we assume that an objection would have been sustained, Weaver has failed to show how he was prejudiced. Robertson testified that he was shot in the chest and arm, and a surgeon's report describing Robertson's injuries was admitted at trial. The x-ray was cumulative of other evidence, and Weaver has failed to show that he was prejudiced by his trial counsel's failure to object.

As for the vouching testimony, Weaver argues that his trial counsel should have objected to Officer Justin Faw's direct examination testimony, which follows:

> Q. Can you tell the jury whether the shell casings' location were consistent, uh, with Stacey Fritch's, uh, description of how the shooting occurred?
> A. Yes the shell casings, uh, lying there, uh, would affirm her statement.

> Q. Would the shell casings, 'scuse me, consistency be present in the number of shell casings you found? In terms of her description of how many shots were fired?
> A. Yes she stated five (5) ta six (6) an' I located five (5).

Transcript at 223.

Ind. Evidence Rule 704(b) provides that "[w]itnesses may not testify to opinions concerning intent, guilt, or innocence in a criminal case; the truth or falsity of allegations; whether a witness has testified truthfully; or legal conclusions." Here, Officer Faw did not testify that Fritch has testified truthfully. Rather, Officer Faw simply testified that the physical evidence was consistent with Fritch's description of the events. Thus, Officer Faw did not vouch for Fritch, and Weaver has failed to demonstrate that an objection to Officer Faw's testimony would have been sustained. See, e.g., Hook v. State, 705 N.E.2d 219, 221-223 (Ind. Ct. App. 1999) (holding that a detective's testimony that in his experience dealing with child molestation cases it was not uncommon for children to give inconsistent statements over time was not a direct comment upon the credibility of the victim's testimony), trans. denied. As a result, Weaver has failed to demonstrate that he received ineffective assistance of trial counsel.

For the foregoing reasons, we affirm Weaver's convictions for attempted murder as a class A felony, unlawful possession of a firearm by a serious violent felon as a class B felony, and being an habitual offender.

Affirmed.

MAY, J. and BAILEY, J. concur